

UNITED STATES OF AMERICA

V.

SALIM AHMED HAMDAN

**DEFENSE NOTICE OF
MOTION TO DISMISS**

**(MILITARY
COMMISSIONS
INPROPERLY
CONSTITUTED IN
VIOLATION OF
THE EQUAL
PROTECTION
CLAUSE)**

19 August 2004

The Defense in the case of the *Salim Ahmed Hamdan* provides the following notice of motion:

1. This Notice is filed in accordance with the Presiding Officer's Order made via Email on 31 July 2004.
2. Relief Requested: The Defense seeks dismissal of charges because this Military Commission is not properly constituted.
3. Synopsis of Legal Theory: The President's Military Order constitutes an unconstitutional violation of Mr. Hamdan's right to equal protection of the laws of the United States. Mr. Hamdan may only be tried by a military commission by dint of his non-citizenship. The Military Order, by its terms, applies only to non-citizens. The Military Order is, to the best of Petitioner's understanding, the first of its kind to make this citizen/alien distinction. It runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution. The Framers of the Clause understood that discrimination against aliens was pervasive and problematic and therefore intentionally extended the reach of the Clause to "persons" rather than confining it to "citizens." Foremost in their minds was the language of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1856), which had been utilized to limit due process guarantees by framing them as nothing more than the "privileges of the citizen."

The Military Order reverts back to an antebellum concept of fundamental rights, one in which aliens are singled out for lesser forms of justice than other citizens. While the government is given considerable latitude in areas such as immigration, under the Constitution there is little or no room for government by approximation when it puts people on one side or the other of a crude line that differentiates between individuals who are given access to the fundamental protections of civilian justice (including indictment, a jury trial presided over by a judge not answerable to the prosecutor, and access to an appeal before a commission independent of the prosecuting authority) and those afforded

only a distinctly less protective and inferior brand of adjudication.¹ If the Executive Branch ever may take such a step—shunting aliens into a procedure from which all U.S. citizens are spared—he may do so only upon a convincing showing of necessity that matches the claim of threat to the fact of alienage. This singling out of aliens for such fundamental disfavor might be justified in rare circumstances, but it is hard to imagine—and, absent explicit congressional action, impossible to assume that such circumstances are present today.

4. Witnesses and Evidence: In the event that abeyance of hearing this motion requested below is not granted, the Defense intends to call expert witnesses concerning the Constitutionality of Commission proceedings in support of this motion.

5. Oral Argument: Because the full facts will not be known until such time as a conclusion of evidentiary hearing, the Defense requests oral argument for this motion.

6. Request for an Extension of Time: Defense moves to incorporate the decisions of the Federal Court into this tribunal process and to hold hearing of this motion in abeyance pending its resolution of the Constitutionality of the President's Military Order. In order to resolve whether the Military Commission is properly constituted to hear the United States case against Mr. Hamdan; the Military Commission must determine constitutionality of President's Order. Detailed Defense Counsel has already challenged in federal court on Mr. Hamdan's behalf as "next friend," the right of the government to hold Mr. Hamdan in pretrial confinement pursuant for a proceeding that is facially unconstitutional. In order for the Federal Court to resolve the merits of Detailed Defense Counsel's petition, the Federal Court must determine whether the constitutionality of President's Military order. Detailed Defense Counsel anticipates resolution of this issue prior to its proposed date for commencement of the Commission to hear evidence on the merits of the case. Accordingly, the Defense moves to incorporate the decisions of the Federal Courts into this tribunal process and to hold hearing of this motion in abeyance pending the resolution of the constitutionality of these proceedings in Federal Court.

The proper course for this Commission to proceed is to allow for the Federal Court to decide these matters and for the Commission to follow the Federal Court's guidance. As stated by Attorney General Biddle in the Nazi Saboteur case; in his response to the defense's claim that "the order of the President creating this court is invalid and unconstitutional," Biddle said in part that:

In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants.

¹ The Military Commission rules thus violate notions of procedural due process and Article III protections, not simply in the ways indicated above, but also in matters such as access to exculpatory evidence and the right to confront witnesses.

In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.

Thirdly, this is not a trial of offenses of law of the civil courts but is a trial of the offense of the law of war, which is not cognizable to the civil courts. It is the trial, as alleged in the charges, of certain enemies who crossed our borders, crossed our boundaries, which had then been described by the military and naval authorities, and who crossed in disguise in enemy vessels and landed here. They are exactly and precisely in the same position as armed forces invading this country. I cannot think it conceivable that any commission would listen to an argument that armed forces entering this country should not be met by the resistance of the Army itself under the Commander-in-Chief or that they have any civil rights that you can listen to in this proceeding.

Transcript available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm ("Saboteur Tr.") (Emphasis added). See also Rehnquist, *All The Laws But One* 137 (1998); *Saboteur Tr.*, at 2765 (adjourning commission for a number of days so that defendants could proceed in Supreme Court); *id.*, at 2935 (remarks of the lead prosecutor, the Judge Advocate General defending commission's jurisdiction: "the defense counsel have attempted to show that Long Island and Florida were not in the theater of operations. I will admit that that contention was made before the decision of the Supreme Court yesterday on the habeas corpus matter. It seems to me that that probably will straighten out the question as to whether this is a theater of operation."); *id.*, at 2963 (remarks of Judge Advocate General, "I do not see how counsel can plead surprise when counsel was arguing that very thing to the Supreme Court)

In the present case, as with the Nazi saboteurs, the question of the Constitutionality is now before a civil court and as conceded by the government in its statements and practice with respect to the Nazi saboteurs, the Federal District Court's finding of law will be determinative on this Commission and judicial economy dictates that this motion be held in abeyance pending the civil court's resolution.

.